

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTONIA RUSSELL,

Plaintiff,

v.

WERNER ENTERPRISES, INC.,

Defendant.

No. C 14-3839 PJH

**ORDER GRANTING MOTION
TO TRANSFER VENUE**

In this action, plaintiff Antonia Russell asserts wage-and-hour claims against defendant Werner Enterprises, Inc. ("Werner") on her own behalf and on behalf of a proposed class of truck drivers employed by Werner who at any time during the four years prior to the filing of the complaint drove a truck for Werner in the State of California. Werner is incorporated in the State of Nebraska and its headquarters are located in Omaha, Nebraska.

Before the court is Werner's motion for an order transferring the case to the District of Nebraska, where two other wage-and-hour cases filed against Werner by its truck drivers are pending. Werner seeks transfer under the "first-to-file" rule, or, in the alternative, under 28 U.S.C. § 1404(a) for the convenience of parties and witnesses. Having read the parties' papers and carefully considered their arguments and the relevant

1 legal authority, the court hereby DENIES the motion to transfer under the "first-to-file" rule,
2 and GRANTS the motion the motion to transfer for the convenience of parties and
3 witnesses.

4 1. Transfer under the "first-to-file" rule

5 Under the "first to file" rule, "when two identical actions are filed in courts of
6 concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit."
7 Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982). "The doctrine is
8 designed to avoid placing an unnecessary burden on the federal judiciary, and to avoid the
9 embarrassment of conflicting judgments." Church of Scientology of Cal. v. U.S. Dep't of
10 Army, 611 F.2d 738, 750 (9th Cir. 1979).

11 A federal district court has discretion to dismiss, stay, or transfer a case to another
12 district under the "first-to-file" rule. Alltrade, Inc. v. Uniweld Prods. Inc., 946 F.2d 622, 628
13 (9th Cir. 1991). In determining whether to apply the rule, courts generally consider three
14 factors: (1) the chronology of the actions; (2) the similarity of the parties; and (3) the
15 similarity of the issues. Id. at 625.

16 The motion is DENIED. While it is true that the Nebraska actions were filed before
17 this action, and that Werner is a defendant in all three actions, and that all three actions
18 challenge one or more of Werner's practices with regard to compensating its drivers, it also
19 appears that the members of the Nebraska classes and the putative members of the class
20 proposed in this case are not the same.

21 In addition, while the issues are broadly similar, in that the plaintiffs in each case
22 allege that Werner failed to pay them as required under the applicable law, the present
23 action asserts claims only under California law, while the Nebraska cases assert claims
24 under federal law and Nebraska law. Accordingly, Werner has not met its burden of
25 showing that transfer is warranted under the "first-to-file" rule.

26 2. Transfer under 28 U.S.C. § 1404(a)

27 "For the convenience of parties and witnesses, in the interest of justice, a district
28 court may transfer any civil action to any other district or division where it might have been

1 brought or to any district or division to which all parties have consented.” 28 U.S.C.
2 § 1404(a). A district court conducts an “individualized, case-by-case consideration of
3 convenience and fairness” and considers multiple factors when determining if transfer is
4 appropriate. Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir.2000) (quotation
5 and citation omitted).

6 Courts in this district commonly use the following factors to evaluate whether the
7 interests of justice warrant a transfer of venue under § 1404(a): (1) the plaintiff's choice of
8 forum, (2) the convenience of the parties, (3) the convenience of the witnesses, (4) the
9 ease of access to the evidence, (5) the familiarity of each forum with the applicable law,
10 (6) the feasibility of consolidation of other claims, (7) any local interest in the controversy,
11 and (8) the relative court congestion and time of trial in each forum. See Williams v.
12 Bowman, 157 F.Supp. 2d 1103, 1106 (N.D. Cal. 2001); see also Vu v. Ortho-McNeil
13 Pharmaceutical, Inc., 602 F.Supp. 2d 1151, 1156 (N.D. Cal. 2009).

14 The motion is GRANTED. The parties do not dispute that venue is proper in the
15 State of Nebraska, or that the case could have been brought there. Thus, the only
16 disputed issues involve the "convenience" factors and the other factors identified in, e.g.,
17 Williams.

18 With regard to the convenience of the parties, it would be more convenient for
19 Werner to litigate the case in Nebraska, where its headquarters are located and all its
20 records are maintained, and where it is already defending against two other class actions
21 challenging its methods and practices with regard to paying its truck drivers.

22 With regard to plaintiff's convenience, the court notes, first, that plaintiff is a resident
23 of Mississippi, and does not claim to have lived in California during the relevant period. Nor
24 does she explain why California would be a more convenient forum for her. Werner has
25 provided evidence showing that plaintiff made more than 130 trips during her periods of
26 employment for Werner between January 2013 and the present, but that only five of those
27 started or ended at a location in California. All other trips started or ended outside of
28 California. Notwithstanding having minimal contacts with the State, plaintiff chose to file

1 suit in California, possibly because that is where her counsel are located. However, the
2 convenience of counsel is irrelevant for purposes of considering the convenience of parties.
3 See Zimpelman v. Progressive Northern Ins. Co., 2010 WL 135325 at *1 (N.D. Cal. Jan. 8,
4 2010); Costco Wholesale Corp. v. Liberty Mut. Ins. Co., 472 F.Supp. 2d 1183, 1195-96
5 (S.D. Cal. 2007).

6 Ordinarily, the defendant must make a strong showing of inconvenience to
7 overcome the plaintiff's choice of forum. See Decker Coal Co. v. Commonwealth Edison
8 Co., 805 F.2d 834, 843 (9th Cir. 1986). However, this presumption may be rebutted due to
9 a variety of circumstances, including when the party who has selected the challenged
10 forum does not reside there; where there is some suggestion of forum shopping by the
11 non-moving party; and when the chosen forum lacks a significant connection to the
12 activities alleged in the complaint. Signal IP, Inc. v. Ford Motor Co., 2014 WL 4783537 at *3
13 (C.D. Cal. Sept. 25, 2014); Microsoft Corp. v. Tivo, Inc., 2011 WL 1930640 at *3 (W.D.
14 Wash. May 19, 2011); Williams, 157 F.Supp. 2d at 1107; see also Schwarzer, Tashima &
15 Wagstaffe, Federal Civil Procedure Before Trial (2014 ed.) § 4:761. Thus, in this case, the
16 court finds that the convenience of the defendant Werner outweighs that of the plaintiff.

17 With regard to the convenience of witnesses, which is generally considered "the
18 most important factor" in determining whether a transfer under § 1404(a) is appropriate, the
19 court finds that Werner's identification of its witnesses by job function and its showing that
20 its corporate headquarters, key employees, and relevant documents are all located in
21 Nebraska, outweigh plaintiff's unsupported assertion that fewer than one quarter of the
22 unnamed class members may reside in California, and that there are thousands of non-
23 party Californians "who observed drivers when their trucks were stopped and have material
24 testimony on that point."

25 Finally, the court finds that the remaining factors largely favor transfer. In particular,
26 because all the relevant employment and personnel records – and employees who are
27 familiar with those records and able to testify about them – are located in Omaha, the factor
28 of ease of access to proof favors transfer.

1 Accordingly, it is hereby ORDERED that this case be transferred to the District of
2 Nebraska. The date for the hearing on this motion, previously set for October 8, 2014, is
3 VACATED.

4
5 **IT IS SO ORDERED.**

6 Dated: October 6, 2014



PHYLLIS J. HAMILTON
United States District Judge